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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 WELLS FARGO FINANCIAL NEVADA 2,  
8 INC., a Nevada corporation,  
9 Plaintiff,

Case No. 2:17-cv-01511-RFB-CWH

ORDER

10 v.

11 EDDIE HADDAD, an individual; DESERT  
12 INN MOBILE FAMILY ESTATES  
13 OWNERS ASSOCIATION; a Nevada non-  
profit corporation; VIAL FOTHERINGHAM  
LLP, an Oregon limited-liability partnership;  
14 Defendants.

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16 **I. INTRODUCTION**

17 Before the Court is Defendant Eddie Haddad's Renewed Motion to Dismiss. ECF No. 41.  
18 Plaintiff Wells Fargo Financial Nevada 2, Inc. opposed the motion, ECF No. 42, and Defendant  
19 replied, ECF No. 43.

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21 **II. PROCEDURAL BACKGROUND**

22 This matter arises from a nonjudicial foreclosure sale conducted by a homeowners'  
23 association under Nevada Revised Statutes ("NRS") Chapter 116 in March 2015. ECF No. 1.

24 Plaintiff sued Defendant on May 26, 2017.<sup>1</sup> Id. Plaintiff asserts six claims: (1) quiet title  
25 or declaratory relief under the Takings Clause of the Fifth and the Fourteenth Amendment to the  
26 federal constitution; (2) quiet title or declaratory relief under the Due Process Clause of the Fifth

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28 <sup>1</sup> Plaintiff also sued Defendant Desert Inn Mobile Family Estates Owner Association and  
Vial Fotheringham LLP. ECF No. 1. Both have been dismissed from this matter by stipulation.  
ECF Nos. 23, 27.

1 and the Fourteenth Amendment to the federal constitution; (3) wrongful foreclosure; (4) violation  
2 of NRS 116.1113 *et seq.*; (5) quiet title; and (6) unjust enrichment. Id. Plaintiff also filed a notice  
3 of lis pendens. ECF No. 4.

4 Defendant moved to dismiss the complaint on October 19, 2017. ECF No. 28. The Court  
5 dismissed the motion without prejudice and stayed the matter on July 13, 2018, pending resolution  
6 of a certified question before the Nevada Supreme Court. ECF No. 40. The Nevada Supreme  
7 Court issued its decision on the certified question in August 2018.

8 Defendant now moves to dismiss the complaint again. ECF No. 41.  
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### 10 **III. FACTUAL BACKGROUND**

11 The complaint alleges the following:

12 This matter concerns the parties' interests in the property located at 3658 Death Valley  
13 Drive, Las Vegas, NV 89122. The property is governed by the community's recorded Conditions,  
14 Covenants & Restrictions ("CC&Rs"). The CC&Rs contain a mortgage savings clause, which  
15 states that any lien on the property is not superior to a deed of trust recorded against the property.  
16 The community is governed by a homeowner's association: Desert Inn Mobile Family Estates  
17 Owners Association ("the HOA").

18 On May 12, 2006, nonparties Mary Mullinax and Ellen Mullinax executed a promissory  
19 note for \$112,319.37. The note was secured by a deed of trust in favor of Plaintiff as the lender.  
20 The deed of trust therefore encumbered the property. The deed of trust was recorded by on May  
21 17, 2006. Plaintiff owns the note and the deed of trust.

22 On June 3, 2014, Goodman Law Offices submitted a notice of delinquent assessment for  
23 recording on behalf of the HOA. The notice of delinquent assessment did not state that it regarded  
24 a super-priority lien and did not indicate in any way that it regarded a lien superior to Plaintiff's  
25 deed of trust.

26 On September 12, 2014, a notice of default and election to sell real property ("notice of  
27 default") was recorded by Vial Fotheringham LLP on behalf of the HOA for outstanding amounts

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1 owed. Like the notice of delinquent assessment, the notice of default did not state that it regarded  
2 a super-priority lien or a lien superior to Plaintiff's deed of trust.

3 On February 17, 2015, a notice of foreclosure sale was recorded by Vial on behalf of the  
4 HOA for outstanding amounts owed. The notice of foreclosure sale also failed to indicate that the  
5 sale would foreclose on a super-priority lien or jeopardize Plaintiff's deed of trust.

6 On April 20, 2015, a foreclosure deed ("trustee's deed") was recorded by Vial on behalf of  
7 the HOA, showing Defendant purchased the property for \$6,100 at public auction on March 25,  
8 2015.

9 In light of the statements in the recorded notices, Defendant believes that the HOA did not  
10 intend to extinguish Plaintiff's deed of trust and did not convey authorization to Vial to foreclose  
11 on the super-priority portion of the HOA lien.

#### 12 13 **IV. LEGAL STANDARD**

14 In order to state a claim upon which relief can be granted, a pleading must contain "a short  
15 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.  
16 8(a)(2). In ruling on a motion to dismiss for failure to state a claim, "[a]ll well-pleaded allegations  
17 of material fact in the complaint are accepted as true and are construed in the light most favorable  
18 to the non-moving party." Faulkner v. ADT Security Servs., Inc., 706 F.3d 1017, 1019 (9th Cir.  
19 2013). To survive a motion to dismiss, a complaint must contain "sufficient factual matter,  
20 accepted as true, to state a claim to relief that is plausible on its face," meaning that the court can  
21 reasonably infer "that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556  
22 U.S. 662, 678 (2009) (citation and internal quotation marks omitted).

#### 23 24 **V. DISCUSSION**

25 Defendant moves to dismiss the complaint on seven bases, which the Court considers in  
26 turn.

##### 27 **a. Unclean Hands & Laches**

28 Defendant argues that Plaintiff is estopped from bringing its claims by unclean hands and

1 the failure to mitigate doctrine because, according to the facts as pled in the complaint, it argues  
2 that Plaintiff did not pay the super-priority lien or take any action whatsoever.

3 The Court does not find any facts pleaded on the face of the complaint that support  
4 estopping Plaintiff on the basis of either unclean hands or failure to mitigate. Construing the  
5 pleaded facts in the light most favorable to Plaintiff, these doctrines do not apply. Unclean hands  
6 can prevent a plaintiff from pursuing equitable relief where a “willful act” by the plaintiff “rightfully  
7 can be said to transgress equitable standards of conduct.” Precision Instrument Mfg. Co. v. Auto.  
8 Maint. Mach. Co., 324 U.S. 806, 815 (1945). Plaintiff certainly does not allege that it committed  
9 any willful act in transgression of equitable standards of conduct. Failure to mitigate is not a  
10 defense that bars suit and cannot be a basis on which to dismiss Plaintiff’s complaint; “[a]ny failure  
11 to mitigate goes to the amount of deficiency owed, not whether a deficiency exists.” Resolution  
12 Tr. Corp. v. BVS Dev., Inc., 42 F.3d 1206, 1216 (9th Cir. 1994).

### 13 **b. Equity Jurisdiction**

14 Defendant argues that Plaintiff has no remedies available against Defendant regarding the  
15 allegedly wrongful foreclosure sale because any wrongful foreclosure can be compensated with  
16 money damages. The Court disagrees and finds that it has “inherent equitable jurisdiction to settle  
17 title disputes.” See Shadow Wood Homeowners Ass’n, Inc. v. New York Cmty. Bancorp., 366  
18 P.3d 1105, 1110–1111 (Nev. 2016). The Court possesses the power to invalidate the foreclosure  
19 sale and/or to make declarations as to the present interests in the Property, or lack thereof, held by  
20 the Parties. Plaintiff may seek equitable relief.

### 21 **c. Facial Constitutionality**

22 Defendant argues that the Nevada Supreme Court has expressly rejected Plaintiff’s  
23 argument that NRS Chapter 116 is facially unconstitutional. The Court agrees that Plaintiff’s facial  
24 constitutionality argument is foreclosed by Nevada Supreme Court case law. In Bourne Valley  
25 Court Trust v. Wells Fargo Bank, NA, the Ninth Circuit held that the opt-in notice scheme outlined  
26 in NRS Chapter 116 did not meet the minimum requirements of constitutional due process and  
27 that NRS 116.31168 did not incorporate the notice requirements of NRS 107.090. 832 F.3d 1154,  
28 1158–59 (9th Cir. 2016), cert. denied, 137 S. Ct. 2296 (2017). This holding was based upon the

1 Ninth Circuit’s interpretation of Nevada’s statutory scheme under NRS Chapter 116 as an “opt-  
2 in” notice statutory scheme. Importantly, the Nevada Supreme Court had not yet had a direct  
3 opportunity to construe the applicable statutes. The Nevada Supreme Court thereafter held that  
4 NRS 116.31168 incorporated the notice requirements of NRS 107.090. SFR Investments Pool 1,  
5 LLC v. Bank of New York Mellon, 422 P.3d 1248, 1252 (Nev. 2018). Thus, the Nevada Supreme  
6 Court found notice to be mandatory to interest holders like Plaintiff. Id. As the Nevada Supreme  
7 Court had not previously had an opportunity to explicitly construe the respective state statutes in  
8 terms of their notice requirements and as the Nevada Supreme Court is the final arbiter of the  
9 construction of Nevada statutes, this Court must follow the Nevada Supreme Court’s interpretation  
10 of Nevada statutes in this case. California Teachers Ass’n v. State Bd. of Educ., 271 F.3d 1141,  
11 1146 (9th Cir. 2001) (explaining that “it is solely within the province of the state courts to  
12 authoritatively construe state legislation”); Owen By & Through Owen v. United States, 713 F.2d  
13 1461, 1464 (9th Cir. 1983) (noting that Ninth Circuit’s interpretation of state law is only binding  
14 to the extent there is no subsequent indication from the state court that the interpretation was  
15 incorrect). This Court has previously found consistent with the Nevada Supreme Court’s  
16 interpretation of Nevada law that NRS 107.090 as incorporated by the Nevada HOA lien statute  
17 satisfies due process requirements. JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC,  
18 200 F. Supp. 3d 1141, 1160–61 (D. Nev. 2016). The Court incorporates that prior reasoning by  
19 reference. Based upon the holding of the Nevada Supreme Court in SFR Investments Pool 1 and  
20 this Court’s prior analysis, the Court finds that Nevada’s statutory scheme in NRS Chapter 116  
21 does not violate due process.

22 Therefore, to the extent Plaintiff’s claim is based on the facial unconstitutionality of NRS  
23 Chapter 116, Plaintiff’s claim is not plausible on its face and is dismissed.

24 The Court finds, however, that Plaintiff has stated a plausible claim for an as-applied due  
25 process challenge. Plaintiff alleges that it did not receive complete information about the nature  
26 of the assessments and outstanding fees. The complaint suggests that the notices were in fact  
27 misleading as to the nature of lien and the assessments and fees. While it is a close call, the Court

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1 finds that Plaintiff's allegations are sufficient to create a plausible claim for an as-applied  
2 challenged in relation to the notices in this case.

3 **d. Lack of Super-Priority Notice Requirement**

4 Defendant argues that Plaintiff cannot successfully argue that the HOA did not provide  
5 proper notice of the correct super-priority amount, as there is no such requirement under law.

6 Defendant argues that Plaintiff's claims necessarily fails to the extent Plaintiff alleges that  
7 the notices failed to provide the correct super-priority amount.

8 The Court agrees that the relevant notice statutes at the time the notices were issued did  
9 not require any separate identification of a "super-priority" section with an amount. NRS  
10 116.31162 only required identification of the "deficiency in payment." Plaintiff alleges that the  
11 notices included the amounts due to the HOA. The notices as described in the complaint are  
12 consistent with the applicable statutory requirement.

13 The Court further agrees that, on the face of Plaintiff's complaint, the notices provided did  
14 not deprive Plaintiff of due process under the federal constitution. Before a state takes any action  
15 that will adversely "affect an interest in life, liberty, or property . . . , a State must provide 'notice  
16 reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the  
17 action and afford them an opportunity to present their objections.'" Mennonite Bd. of Missions v.  
18 Adams, 462 U.S. 791, 795 (1983) (quoting Mullane v. Central Hanover Bank & Trust Co., 339  
19 U.S. 306, 314 (1950)). "The notice must be of such nature as reasonably to convey the required  
20 information, . . . and it must afford a reasonable time for those interested to make their appearance."  
21 Mullane, 339 U.S. at 315 (citations and quotations omitted). And "if with due regard for the  
22 practicalities and peculiarities of the case these conditions are reasonably met, the constitutional  
23 requirements are satisfied." Id.

24 **e. Takings**

25 Defendant next moves to dismiss Plaintiff's first claim, which alleges that the foreclosure  
26 sale constitutes a taking in violation of the Fifth and Fourteenth Amendment to the federal  
27 constitution. The Court finds the Nevada Supreme Court's reasoning in Saticoy Bay LLC Series  
28 350 Durango 104 v. Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A.

1 persuasive on this issue. 388 P.3d 970, 975 (Nev. 2017) (holding that “the extinguishment of a  
2 subordinate deed of trust through an HOA’s nonjudicial foreclosure does not constitute a  
3 governmental taking”).

4 In some instances, a state’s regulation of private property may “be so onerous that its effect  
5 is tantamount to a direct appropriation or ouster,” compensable under the takings clause. Lingle  
6 v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005). The Supreme Court has recognized two  
7 categories of *per se* takings that can arise from government regulation of private property. Id. at  
8 538. First, “where government requires an owner to suffer a permanent physical invasion of her  
9 property—however minor—it must provide just compensation.” Id. “A second categorical rule  
10 applies to regulations that completely deprive an owner of all economically beneficial use of her  
11 property.” Id. (internal citation omitted). The allegations in this case do not fall into either one of  
12 these *per se* categories of regulatory taking.

13 If no *per se* category applies to regulatory action, the Court looks to economic impact,  
14 particularly interference with “distinct investment-backed expectations,” as well as whether the  
15 interference “can be characterized as a physical invasion by government” or whether it merely  
16 “adjust[s] the benefits and burdens of economic life to promote the common good.” Penn Cent.  
17 Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Here, the statutory scheme at issue  
18 merely establishes the priority of liens. It does not directly interfere with any distinct investment-  
19 backed expectations, particularly where the acquisition of the property interest occurred well after  
20 the enactment of NRS 116.3116 in 1991. Most importantly, the statutory scheme clearly lays out  
21 the order of priorities so there cannot be a misunderstanding in terms of expectations regarding the  
22 operation of NRS Chapter 116 at the time one acquires an interest in real property in Nevada.  
23 Thus, the Court finds that the sale as alleged in Plaintiff’s complaint cannot constitute a  
24 governmental taking as a matter of law.

#### 25 **f. Commercial Reasonableness**

26 Defendant argues that Plaintiff’s allegation that the sale was not commercially reasonable  
27 fails as a basis to set aside the sale as a matter of law. The Court agrees. NRS Chapter 116 does  
28 not contain any provisions requiring that an HOA foreclosure sale be commercially reasonable,

1 nor does it provide for parties to be able to set aside foreclosure sales as being commercially  
2 unreasonable. Chapter 116 *does* require that “[e]very contract or duty governed by this chapter  
3 imposes an obligation of good faith in its performance or enforcement.” NRS 116.1113. “Good  
4 faith” is defined in the Nevada Revised Statutes as meaning “honesty in fact and the observance  
5 of reasonable commercial standards of fair dealing.” NRS 104.1201(t). This definition only  
6 applies, however, to the extent that an action is governed by another article of the Uniform  
7 Commercial Code (“UCC”) as adopted in Nevada. NRS 104.1102. The Nevada Supreme Court  
8 has clearly held that HOA foreclosure sales are not governed by the commercial reasonableness  
9 standard of the UCC as adopted in Nevada: “we hold that [commercial reasonableness] has no  
10 applicability in the context of an HOA foreclosure involving the sale of real property. As to the  
11 Restatement’s 20-percent standard, we clarify that Shadow Wood did not overturn this court’s  
12 longstanding rule that inadequacy of price, however gross, is not in itself a sufficient ground for  
13 setting aside a trustee’s sale absent additional proof of some element of fraud, unfairness, or  
14 oppression as accounts for and brings about the inadequacy of price.” Nationstar Mortg., LLC v.  
15 Saticoy Bay LLC Series 2227 Shadow Canyon, 405 P.3d 641, 642–43 (Nev. 2017) (internal  
16 citations omitted).

17 Therefore, to the extent Plaintiff’s claim is based on the alleged commercial  
18 unreasonableness of the sale, Plaintiff’s claim is not plausible on its face and is dismissed.

19 **g. Bona Fide Purchaser**

20 Defendant next argues that it is a bona fide purchaser, and that Plaintiff carries the burden  
21 to show otherwise. A bona fide purchaser is one who “takes the property ‘for a valuable  
22 consideration and without notice of the prior equity, and without notice of facts which upon  
23 diligent inquiry would be indicated and from which notice would be imputed to him, if he failed  
24 to make such inquiry.’” Shadow Wood, 366 P.3d at 1115 (citation omitted). Construing the  
25 complaint in the light most favorable to Plaintiff, Plaintiff alleges that Defendant was not a bona  
26 fide purchaser based on the alleged defects in the foreclosure sale. Defendant’s argument does not  
27 regard the sufficiency of the complaint and is not a basis for granting a motion to dismiss. Whether  
28 or not Defendant was a bona fide purchaser is a question of fact.



1           **VI. CONCLUSION**

2           **IT IS ORDERED** that the stay in this case is LIFTED.

3           **IT IS FURTHER ORDERED** that Defendant Eddie Haddad's Renewed Motion to  
4 Dismiss (ECF No. 41) is GRANTED in part and DENIED in part.

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6           DATED: March 31, 2019.

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**RICHARD F. BOULWARE, II**  
**UNITED STATES DISTRICT JUDGE**